A

RE DALJIT KAUR HARJAN SINGH; EX P PERBADANAN PENGURUSAN IXORA

HIGH COURT MALAYA, KUALA LUMPUR
WONG KIAN KHEONG JC
[BANKRUPTCY NO: 29NCC-1271-03-2014]
B 27 MAY 2015

BANKRUPTCY: *Creditor's petition – Verifying petition – Dispute over authority of creditor's deponent to affirm verifying affidavit – Deponent elected as member of management corporation's council in 2012 – Failure to convene AGM in 2013 –*
C *Whether management corporation's council in 2012 remained in office until next annual general meeting – Whether creditor's deponent had locus standi to affirm verifying affidavit*

BANKRUPTCY: *Jurisdiction – Jurisdiction of court – Validity of management corporation's circular resolution – Whether bankruptcy court could question validity*
D *of management corporation's circular resolution – Whether could only be challenged in Civil High Court*

The management corporation of a subdivided building called Ixora Apartments ('the MC') obtained an allocatur against seven persons including
E the respondent. The allocatur provided, *inter alia*, for the respondent to pay to the MC costs, interests and an allocatur fee. The MC then applied to the High Court ('HC') to issue a bankruptcy notice ('BN') against the respondent based on the allocatur. On 17 March 2014, the HC issued a BN which required the respondent to pay a sum of RM37,371.72 within seven days
F from the service of the BN on the respondent. The BN was served on the respondent by way of substituted service. Since the respondent had committed an act of bankruptcy by failing to pay the sum demanded in the BN within seven days, the MC filed a creditor's petition ('CP') against the respondent. The MC's affidavit verifying the CP ('verifying affidavit'), was affirmed by one Anthony Stewart, the chairman of the council ('MC's
G deponent') elected at the annual general meeting ('AGM') in 2012 ('2012 council'). The respondent gave notice of her intention to oppose the CP, however, the notice only stated that the respondent was disputing the act of bankruptcy. In the respondent's affidavit in support of the notice, the respondent alleged, *inter alia*, that the MC had failed to convene an AGM
H in 2013. Accordingly, the MC's deponent had not been elected as a member of the MC's council in 2013 and had no *locus standi* to affirm the verifying affidavit. On the other hand, the MC's deponent claimed although no AGM had been held for 2013, the 2012 council nevertheless remained in office until the next council was elected at the next AGM, therefore, the MC's
I deponent had the *locus standi* to affirm the verifying affidavit based on the circular resolution of the MC dated 19 October 2013. The Deputy Registrar dismissed the CP with costs. Hence, the appeal by the MC. The issues that arose for determination, *inter alia*, were: (i) whether the bankruptcy court had

the jurisdiction to decide on the validity of circular resolutions of the MC's council under the Bankruptcy Act 1967 ('BA') and/or the Bankruptcy Rules 1969 ('BR'); (ii) whether the respondent could challenge the validity of the BN and/or CP by disputing the authority of the creditor's deponent to affirm the verifying affidavit; (ii) whether there was a mandatory requirement under BA and/or BR for the MC's deponent to be duly authorised by the MC to affirm the verifying affidavit; and (iii) whether the MC's deponent was authorised to affirm verifying affidavit based on the deponents membership in the 2012 council.

Held (allowing appeal with costs):

(1) The validity of the circular resolution of the 2012 council could only be challenged if there was an application to the civil High Court. The bankruptcy court had no jurisdiction under the BA and BR to question the validity of the MC's resolutions. The respondent had not filed any suit in the civil court to invalidate the MC's resolutions. The jurisdiction of the bankruptcy court was to be decided solely from the four corners of BA and BR. There was no provision in the BA and BR which empowered the bankruptcy court to ascertain the validity of the MC's resolutions. Accordingly, the Deputy Registrar should not have questioned the validity of the MC's resolutions. (paras 16, 17 & 22)

(2) The respondent could not challenge the validity of the BN because the only contention advanced by the respondent was the lack of authority on the part of the MC's deponent to affirm the verifying affidavit. Further, the respondent did not file a summons in chambers under r. 18(1) BR to set aside the CP on the ground that the MC had breached BA or BR when the MC's deponent had no authority to affirm the verifying affidavit on behalf of the MC. (paras 22 & 23)

(3) Sections 4 and 5(1)(a) to (d) of the BA did not stipulate a condition for the presentation of a CP that the deponent of the verifying affidavit should be duly authorised by the creditor to affirm the verifying affidavit. However, s. 6(1) BA and r. 106(2) of the BR required the contents of the verifying affidavit to be verified by a person who had personal knowledge of the facts upon which the CP was based. (paras 38 & 39)

(4) It is clear from para. 2(1) of the Second Schedule that the 2012 council 'shall cease to hold office at the next' AGM of the MC. Section 39(5) of the Strata Titles Act 1985 ('STA') provided that the provisions of the Second Schedule 'shall have effect in relation to' the MC and council. Therefore, the 2012 council still holds office. If this court holds that the 2012 council ceased to hold office, it would cause undue hardship to all the parcel proprietors of Ixora Apartments and all third parties who dealt with the MC and the council. (paras 41, 42 & 44)

(5) The MC's resolution dated 19 October 2013 which authorised the commencement of bankruptcy proceedings against the respondent was approved by three members of the council, namely, the MC's deponent, Ms Tan and Mr Shong. Ms Tan and Mr Shong have lawfully replaced one En Razdi and Mr KP Lim as members of the 2012 council by reason of the council meeting on 25 August 2013. Since the three members of the 2012 council had signed the MC's resolution were lawful members, the validity of the MC's resolution could not be doubted. Since the MC's deponent was recognised as a member of the 2012 council, the MC's deponent was thus authorised to affirm the verifying affidavit by virtue of his membership in the 2012 council. Hence the Deputy Registrar's decision was set aside. The respondent was adjudicated a bankrupt and a receiving order was granted against the respondent. (paras 50, 52 & 55)

Case(s) referred to:

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(foll)***

Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd [2003] 4 CLJ 34 CA ***(refd)***

Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 SC ***(refd)***

Development & Commercial Bank Berhad v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(refd)***

In Re Kang Chong Yeow, Ex P Mivan Far East Sdn Bhd [2001] 8 CLJ 226 HC ***(foll)***

Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd [1980] 1 LNS 207 FC ***(refd)***

Lim Boon Kiak v. Affin Bank Bhd [2013] 6 CLJ 579 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(foll)***

Management Corporation Strata Title Plan No 460 v. Goldhill Properties (Pte) Ltd & Ors [1991] 3 MLJ 247 ***(refd)***

Moscow Narodny Bank Ltd v. Ngan Ching Wen [2004] 2 CLJ 241 FC ***(foll)***

PP v. Yap Min Woie [1995] 4 CLJ 692 FC ***(refd)***

Re Che Ku Rohaida Che Ku Sin; ex p Public Finance Bhd [2002] 5 CLJ 435 HC ***(refd)***

Re Chen Sing Chew; Ex Parte: Oriental Tin Smelters Sdn Bhd [1974] 1 LNS 204 HC ***(refd)***

Re Ho Fok, ex p Ann Bee (M) Sdn Bhd [2002] 2 CLJ 223 HC ***(foll)***

Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd [1999] 5 CLJ 605 HC ***(refd)***

Re Mat Shah bin Safuan, ex p United Asian Bank Bhd [1990] 1 LNS 115 HC ***(foll)***

Re Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd [1996] 1 LNS 126 HC ***(refd)***

Re Tan Sri Amin Shah Omar Shah; ex p Affin Bank Bhd [2008] 9 CLJ 772 HC ***(refd)***

Re Yong Tet Yin; ex parte United Overseas Bank Ltd [1996] 1 BLJ 158 HC ***(refd)***

Sing Hoe Motor Company Ltd v. PP [1968] 1 LNS 142 HC ***(refd)***

Stephen Wong Leong Kiong v. HSBC Bank Malaysia Bhd [2009] 6 CLJ 466 CA ***(refd)***

Wah Tat Bank Ltd & Ors v. Chan Cheng Kum [1975] 1 LNS 191 PC ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 2, 3(1)(a), (b), (c), (d) (e), (f), (g), (h), (i), 4, 5(1)(a), (b), (c), (d), 6(1), (3), 24(1), 131, 133(a)
Bankruptcy Rules 1969, rr. 4, 18(1), 95(1), (2), 106(2), 117, 215, 274
Building and Common Property (Maintenance and Management) Act 2007, s. 3(1)
Companies (Winding-Up) Rules 1972, r. 26
Courts of Judicature Act 1964, s. 24(c)
Juvenile Courts Act 1947, s. 28
Road Traffic Ordinance 1958, s. 92(4)
Strata Titles Act 1985, ss. 39(2), (3), (4), (5), 55(1)

For the appellant/judgment creditor - Rabinder Singh (Nurhayati Zaabar with him); M/s Rabinder Budiman & Assocs
For the respondent/judgment debtor - Syahredzan Johan; M/s Ramrais & Partners

Reported by S Kahvitha

JUDGMENT

Wong Kian Kheong JC:

Introduction

[1] In this case, a debtor opposes a creditor's bankruptcy petition (CP) filed against her by a management corporation of a subdivided building (MC), by raising a novel contention that the deponent of the MC's affidavit verifying the contents of the CP (verifying affidavit), has not been lawfully authorised to act for the MC and to affirm the verifying affidavit on behalf of the MC. In deciding this interesting submission, the following issues arise:

(a) whether the bankruptcy court has the jurisdiction to decide on the validity of circular resolutions of the MC's council (council) under the Bankruptcy Act 1967 (BA) and/or the Bankruptcy Rules 1969 (BR);

(b) can a debtor challenge the validity of a bankruptcy notice (BN) and/or CP by disputing the authority of the creditor's deponent to affirm the verifying affidavit?;

(c) is there a mandatory requirement under BA and/or BR for the appellant's deponent to be duly authorised by the MC to affirm the verifying affidavit?;

(d) whether members of the council who have been elected at the MC's annual general meeting (AGM) in 2012 (2012 AGM), continue to hold office despite:

(i) the MC's failure to convene an AGM to elect a new council within 15 months from the date of the 2012 AGM; and

(ii) the fact that the MC has been charged with a criminal offence in respect of the MC's failure to hold an AGM under s. 55(1) of the Strata Titles Act 1985 (STA) read with para. 8(2) of the Second Schedule to STA (Second Schedule); and

(e) were members of the 2012 Council lawfully replaced at 2012 Council's meeting so as to fulfil the quorum requirement in para. 4(1)(c) of the Second Schedule?

Background

[2] On 20 December 2010, the MC of a subdivided building called "Ixora Apartments" (appellant) obtained an allocatur (allocatur) against seven persons (seven parties) including the respondent in this case (respondent). The allocatur provided for the seven parties to pay to the MC:

(a) costs amounting to RM26,594.50 (costs);

(b) interest at the rate of 8% per annum on the costs from 23 February 2010 until full payment of the costs; and

(c) allocatur fee of RM2,133.

[3] The appellant applied to the Kuala Lumpur High Court (HC) to issue a BN against the respondent based on the allocatur.

[4] On 17 March 2014, the HC issued the BN which required the respondent to pay RM37,371.72 (consisting of the costs, interest on the costs and the allocatur fee) (sum) within seven days from the service of the BN on the respondent.

[5] The BN has been served on the respondent by way of substituted service.

[6] The respondent did not pay the sum requested in the BN. Hence, the respondent has committed an act of bankruptcy within the meaning of s. 3(1)(i) BA.

[7] The appellant filed a CP against the respondent on 16 June 2014. The verifying affidavit in respect of the truth of the contents of the CP, had been affirmed by Mr Anthony Stewart Jarrat (appellant's deponent), the chairman of the council elected at the 2012 AGM (2012 Council). The appellant's affidavit stated as follows (with grammatical and spelling errors in Malay):

AFIDAVIT MENGENAI KEBENARAN PENYATAAN-PENYATAAN DALAM PETISYEN

Saya, Anthony Stewart Jarrat, cukup umur, waras dan beralamat penyampaian di Ground Floor, Ixora Apartment, Jalan Tun Razak 50400 Kuala Lumpur, sesungguhnya berikrar dan menyatakan seperti berikut:-

1. *Saya merupakan Pengerusi di Perbadanan Pengurusan Ixora iaitu Pempetisyen yang dinyatakan di atas dan mempunyai kuasa sepenuhnya membuat Afidavit ini dan untuk mengemukakan Petisyen tersebut bagi pihak Pemiutang Penghakiman.*

2. *Bahawa tiap-tiap satu pernyataan dalam Petisyen tersebut adalah benar pada pengetahuan saya sendiri.*

(emphasis added)

[8] On 18 September 2014, the respondent gave notice of her intention to oppose the CP (respondent's notice). The respondent's notice stated as follows (with grammatical errors in Malay):

> *Saya, DALJIT KAUR A/P HARJAN SINGH, adalah dengan ini memberi notis kepada kamu bahawa saya bercadang hendak membangkang terhadap pembuatan perintah penerimaan seperti yang diminta dan bahawa saya bercadang hendak mempertikaikan perbuatan kebankrapan* yang memohon itu.
>
> (emphasis added)

It is to be noted that the respondent's notice only stated that the respondent disputed the act of bankruptcy.

Respondent's Submission

[9] The respondent's affidavit in support of the respondent's notice, alleged, among others, the following:

(a) the appellant had failed to convene an AGM in 2013. Accordingly, the appellant's deponent had not been elected as a member of the appellant's council in 2013 and had no *locus standi* to affirm the verifying affidavit;

(b) the 2012 AGM has been held on 11 August 2012. As the appellant has failed to convene an AGM within 15 months from the date of the 2012 AGM, the appellant has been charged in the Kuala Lumpur Magistrate Court (criminal case) with respect to such a failure under s. 55(1) STA read with para. 8(2) of the Second Schedule. The criminal case is still pending;

(c) except for the appellant's deponent, all the members of the 2012 Council have resigned. Accordingly, there was no quorum of four members for the meetings of 2012 Council as required by para. 4(1)(c) of the Second Schedule;

(d) in view of the above reasons, the respondent has not committed any act of bankruptcy and accordingly, the BN as well as the CP are invalid; and

(e) the appellant has victimised the respondent by commencing bankruptcy proceedings against the respondent only without taking any action against six other persons mentioned in the allocatur.

Appellant's Submission

[10] In reply to the respondent's affidavit:

(a) the appellant exhibited a "circular resolution" of the appellant dated 19 October 2013 (appellant's resolution dated 19 October 2013). The appellant's resolution dated 19 October 2013 was signed by the appellant's deponent, Ms Fennie Tan Siew Choon (Ms Tan) and Mr William Shong Wei Liang (Mr Shong). The appellant's resolution provided as follows (with grammatical errors):

We, the undersigned, being the 19th Council Members of [Appellant] do and hereby resolved:

TO COMMENCE EXECUTION PROCEEDINGS AGAINST [RESPONDENT]

It is hereby resolved by Circular Resolution that execution proceedings such as but not limited to initiating bankruptcy to be commenced for recovery of monies owed to [Appellant] from the [Respondent].

(emphasis added);

(b) the appellant's deponent claimed that he had the *locus standi* to affirm the verifying affidavit based on the appellant's resolution dated 19 October 2013;

(c) although no AGM has been held for 2013, the 2012 Council nevertheless remains in office until the next council is elected at the next AGM;

(d) the 2012 Council has the necessary quorum to carry on its meetings; and

(e) the appellant did not victimise the respondent as the appellant had also taken bankruptcy proceedings against another parcel proprietor in "Ixora Apartments".

Proceedings Before Deputy Registrar (DR)

[11] The learned DR, Puan Maimoonah binti Aid, dismissed the CP with costs of RM500 (DR's decision). Hence, the appellant's appeal to this court against the DR's decision in court encl. No. 36 (this appeal).

[12] The learned DR gave a written judgment (DR's judgment) in respect of the DR's decision.

[13] I must commend the learned DR for a clear and reasoned DR's judgment. It is entirely my misfortune to differ with certain aspects of the DR's judgment (as explained later in this judgment).

[14] According to the DR's judgment:

(a) based on the Court of Appeal case of *Dato' Sri Teong Teck Leng v. Jupiter Securities Sdn Bhd* [2003] 4 CLJ 34; [2004] 1 MLJ 1, the respondent's notice had failed to specify which statement in the CP was denied by the respondent. Notwithstanding such a failure, the respondent's affidavit had stated the grounds to oppose the CP and the appellant had not objected to the validity of the respondent's notice. Accordingly, the learned DR accepted the respondent's notice "as properly filed and served";

(b) the MC is different from the council although both are "interrelated". The council shall only exercise powers and perform duties of MC subject to restrictions imposed or directions given by MC at a general meeting. The council is not a legal entity, unlike the MC;

(c) the appellant's resolution dated 19 October 2013, "at most", provided for the appellant to initiate execution proceedings against the respondent. There is no evidence to show that the appellant's deponent has been given authority by the appellant to sign the verifying affidavit;

(d) the council members shall only cease to hold office until the next AGM. Since there is no AGM in 2013, the 2012 Council continues to be in office;

(e) there is no evidence that two of the members of the 2012 Council, Encik Mohd Radzi bin Ismail (Encik Radzi), and Mr Lim Kah Poon (Mr KP Lim), have resigned;

(f) a circular resolution of the 2012 Council dated 29 August 2013 (appellant's resolution dated 29 August 2013) has been signed by the appellant's deponent, Mr KP Lim and Mr Lim Poh San (Mr PS Lim). The appellant's resolution dated 29 August 2013 has resolved that Ms Tan and Mr Shong "be seconded as alternate to" Encik Radzi and Mr KP Lim. The 2012 Council consists of seven members. Hence, a quorum of four members of 2012 Council is required by para. 4(1)(c) of the Second Schedule. Accordingly, the validity of the appellant's resolution dated 29 August 2013 which has only been signed by three members of the 2012 Council, is "questionable"; and

(g) as there is no evidence that Encik Radzi and Mr KP Lim have resigned as members of the 2012 Council, the appointment of Ms Tan and Mr Shong as members of the 2012 Council may be invalid.

Can Bankruptcy Court Decide On Validity Of Council's Circular Resolutions?

Relevant Provisions Of STA (Part F1)

[15] The following provisions in STA are relevant in this case:

Establishment of management corporation

s 39(1) Upon the opening of a book of the strata register in respect of a subdivided building there shall, by the operation of this section, come into existence a management corporation consisting of all the parcel proprietors including in the case of phased development, the proprietor of the provisional block or blocks.

(2) *The management corporation established by subsection (1) shall be known by the name appearing in the book of the strata register relating to a subdivided building, and shall be a body corporate having perpetual succession and a common seal.*

…

(3) *The management corporation may sue and be sued.*

(4) *The management corporation shall elect a council which, subject to any restriction imposed or direction given by the management corporation at a general meeting, shall perform the management corporation's duties and conduct the management corporation's business on its behalf, and may for that purpose exercise any of the management corporation's powers.*

(5) *The provisions of the Second Schedule shall have effect in relation to the management corporation and its council.*

2nd Schedule

Constitution of council

paragraph 2(1) Subject to the provisions of this paragraph and to any rules made under the Act, the council shall consist of not less than three and not more than fourteen proprietors, who shall be elected at each annual general meeting and shall cease to hold office at the next annual general meeting.

…

(4) *A member of the council may resign his office at any time in writing under his hand addressed to the corporation.*

(5) *Where a vacancy in the membership of the council occurs otherwise than by operation of subparagraph (1) or (3), the remaining member may appoint another proprietor to be a member until the next annual general meeting.*

Quorum for council meetings

paragraph 4(1) Except where there is only one proprietor, a quorum at meetings of the council shall be –

(a) two, where there are not more than four members;

(b) *three, where there are five or six members*;

(c) four, where there are seven or eight members;

(d) five, where there are nine or ten members;

(e) six, where there are eleven or twelve members; and

(f) seven, where there are thirteen or fourteen members.

(3) *Every meeting of the council shall be presided over by a chairman who shall be elected from among themselves by the members of the council present at the meeting and who shall have a casting as well as an original vote.*

(4) *Subject to this paragraph, the council may regulate its own procedure at meetings.*

Annual general meeting

pararaph 8(1) The corporation shall hold an annual general meeting for the consideration of accounts, election of the council and the transaction of such other business as may arise.

(2) The first annual general meeting shall be held within one month after the expiry of the initial period and subsequent annual general meetings shall be held once in each year:

Provided that not more than fifteen months shall elapse between the date of one annual general meeting and the next:

And provided further that the holding of any annual general meeting out of time in breach of this paragraph shall not affect the validity of the annual general meeting.

(emphasis added)

[16] I am of the following view regarding the above provisions in the STA:

(a) according to s. 39(2) and (3) STA, the MC is a legal person who may sue or be sued;

(b) by virtue of s. 39(4) STA, subject to any restriction imposed or direction given by the MC at the MC's general meeting, the council shall perform the MC's duties and conduct the MC's business on behalf of the MC, and may for that purpose exercise any of the MC's powers. In *Management Corporation Strata Title Plan No 460 v. Goldhill Properties (Pte) Ltd & Ors* [1991] 3 MLJ 247, at p. 247 (*Goldhill Properties* case), Tan Teow Yeow JC in the Singapore High Court described the council as being akin to a board of directors (BOD) of a company. *Goldhill Properties* case concerns Singapore's Land Titles (Strata) Act (Cap 158) (LTSA) which has similar provisions to our STA. Accordingly, Singapore cases on LSTS are persuasive in respect of the interpretation of similar provisions in STA;

(c) the STA does not expressly provide for "circular resolutions" of the council. A "circular resolution" of the council refers to a "paper resolution" which has been circulated to all members of the council for their written approval without holding a meeting of the council. I am of the opinion that the council may pass "circular resolutions" for the following reasons:

(i) there is nothing in STA to prohibit the council from approving "circular resolutions". Nor is there anything in STA which mandatorily requires the council to hold meetings to pass resolutions;

(ii) as held in *Goldhill Properties* case, the council is akin to a BOD. If a BOD may pass "circular resolutions", there is no reason why the council cannot similarly approve "circular resolutions". There is also no policy consideration to prevent the council from passing "circular resolutions"; and

(iii) "circular resolutions" may expedite the council's decision-making process for the benefit of the MC, council, the parcel proprietors and third parties dealing with MC. This is especially so when council members consists of parcel proprietors who are not paid to attend council meetings and they consent to act as council members in the interest and welfare of all the parcel proprietors in the subdivided building in question; and

(d) the validity of the appellant's resolutions dated 29 August 2013 and 19 October 2013 can only be challenged if there is an application to the Civil High Court (not to the bankruptcy court) by a party "aggrieved" by the appellant's resolutions dated 29 August 2013 and 19 October 2013. For reasons stated later in this judgment, the bankruptcy court has no jurisdiction under the BA and BR to question the validity of the appellant's resolutions dated 29 August 2013 and 19 October 2013.

[17] In this case, the respondent has not filed any suit in the civil court to invalidate the appellant's resolutions dated 29 August 2013 and 19 October 2013.

Jurisdiction Of Bankruptcy Court (Part F2)

[18] Section 24(c) of the Courts of Judicature Act 1964 provides that the High Court has jurisdiction under any written law relating to bankruptcy.

[19] The following provisions in BA and BR are pertinent to this appeal:

Acts of bankruptcy

s 3(1) A debtor commits an act of bankruptcy in each of the following cases:

[paragraphs (a) to (g)];

(i) *if a creditor has obtained a* final judgment or *final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the* judgment debt or *sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice*, or to secure or compound for it to the satisfaction of the creditor or the court; and *he does not within seven days after service of the notice in case the service is effected in Malaysia*, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, *either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid* and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained: Provided that for the purposes of this paragraph and of section 5 any

person who is for the time being entitled to enforce a final judgment or final order shall be deemed to be a creditor who has obtained a final judgment or final order; …

Jurisdiction to make receiving order

s 4 Subject to the conditions hereinafter specified, if a debtor has committed an act of bankruptcy, the Court may on a bankruptcy petition being presented, either by a creditor or by the debtor make an order for the protection of the estate, which order is in this Act called a receiving order.

Conditions on which creditor may petition

s 5(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless –

(a) *the debt owing by the debtor to the petitioning creditor*, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, *amounts to thirty thousand ringgit*;

(b) the debt is a liquidated sum payable either immediately or at some certain future time;

(c) *the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition*; and

(d) the debtor is domiciled in Malaysia or in any State or within one year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business in Malaysia or has carried on business in Malaysia personally or by means of an agent or is or has been within the same period a member of a firm or partnership which has carried on business in Malaysia by means of a partner or partners or an agent or manager.

Proceedings and order on creditor's petition

s 6(1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.

(2) *At the hearing the court shall require proof of –*

(a) *the debt of the petitioning creditor*;

(b) *the act of bankruptcy* or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and

(c) if the debtor does not appear, the service of the petition, and if satisfied with the proof may make a receiving order in pursuance of the petition.

(3) *If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.*

(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.

(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security, if any, being given as the court may require for payment to the petitioner of any debt which may be established against the debtor in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

Formal defect not to invalidate proceedings

s 131 No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Acts of corporations, firms and mentally disordered persons

s 133. For all or any of the purposes of this Act –

(a) *a corporation may act by any of its officers authorised in that behalf under the seal of the corporation*;

(b) a firm may act by any of its members;

(c) a mentally disordered person or lunatic may act by his committee or *curator bonis*.

(emphasis added)

[20] The following provisions in BR are relevant in this case:

Applications to be made by summons in chambers

rule 18(1) Except where these Rules or the Act otherwise provide, every application to the Court shall, unless the Chief Justice otherwise directs, be made by summons in chambers supported by affidavit.

Application to set aside

rule 95(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

95(2) *If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time, and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.*

Verification

rule 106(1) A creditor's petition shall be verified by affidavit.

106(2) A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them.

Officer of corporation, etc

rule 215 Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an "officer" within section 133, and if duly authorised under seal can act for the corporation.

Effect of non-compliance with Rules

rule 274. Non-compliance with any of these Rules or with any rule of practice for the time being in force shall not render any proceeding void unless the Court shall so direct but such proceeding may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the Court may think fit.

(emphasis added)

[21] In *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340 at pp. 350 & 351; [1998] 2 MLJ 425, at pp. 433 and 434 (*MBSB*'s case), Gopal Sri Ram JCA (as His Lordship then was) delivered the following judgment of the Court of Appeal:

It is settled law that bankruptcy jurisdiction is statutory so that the powers of a bankruptcy court are to be discovered from within the terms of the relevant statute. See, *Re Thomas, ex p Inland Revenue Commissioners v. Falconer & Ors* [1984] 1 WLR 232; *Ex parte Reynolds; In re Barnett* (1884-85) 15 QBD 169 and *Ellis v. Silber* (1872) LR 8 Ch App 83. …

I am therefore in agreement with Mr Das' submission that there is absent in the High Court in our country, any power to award damages upon making orders under s. 105 [BA]. Put another way, a High Court exercising bankruptcy jurisdiction under 105 [BA] may only make those orders referred to in the five subsections thereunder. It cannot make any other orders.

(emphasis added)

[22] Based on *MBSB*'s case, the jurisdiction of the bankruptcy court is to be decided solely from the four corners of BA and BR. I am of the view that there is no provision in the BA and BR which empowers the bankruptcy court to ascertain the validity of the appellant's resolutions dated 29 August 2013 and 19 October 2013. Furthermore, it is neither necessary nor desirable for the bankruptcy court to question the validity of any resolution of MC, council, company or BOD. Accordingly, the learned DR should not have questioned the validity of the appellant's resolution dated 29 August 2013.

BN Is Valid In This Case

[23] The above provisions in the BA and BR distinguish the grounds to challenge the validity of a BN and to oppose a CP. I rely on the Court of Appeal's judgment given by Abdul Hamid Mohamad FCJ (as His Lordship then was) in *Dato' Sri Teong Teck Leng*, at para. 29, as follows:

> Before going any further, it is worthwhile to mention that *there are two stages in a bankruptcy proceeding, namely, the notice stage and the petition stage.*
>
> (emphasis added)

[24] A debtor may challenge the validity of a BN under r. 95(1) BR by filing an affidavit in Form 7 of the Appendix to BR (Form 7). Form 7 provides as follows:

> **No. 7**
>
> (Rule 95)
>
> (Title)
>
> **AFFIDAVIT ON AN APPLICATION TO SET ASIDE BANKRUPTCY NOTICE**
>
> I, ... of ... affirm and say:
>
> 1. That I was, on the ... day of ..., served with the notice hereunto annexed (or describe the notice) .
>
> That **I have satisfied the judgment debt claimed by ... by (state nature of satisfaction)**.
>
> **Or**
>
> 2. That **I have a counter-claim (or set-off or cross demand) for $ ... being a sum equal to (or exceeding) the claim of the said ... in respect of (here state grounds of counter-claim)**.
>
> 3. **That I could not have set up the said counter-claim (or as the case may be) in the action in which the said judgment was obtained against me**.
>
> (emphasis added)

[25] Once Form 7 has been affirmed by the debtor to set aside the BN, r. 95(2) BR deems that no act of bankruptcy (as understood in s. 3(1)(a) to (i) BA) has been committed until the Bankruptcy Registrar decides on the debtor's application to set aside BN. In *Datuk Lim Kheng Kim v. Malayan Banking Bhd* [1993] 3 CLJ 324 at p. 328; [1993] 2 MLJ 298, at pp. 303-304, Mohd Dzaiddin SCJ (as His Lordship then was) held in the Supreme Court that r. 95(2) BR is only directory:

> Further, under sub-r. (2) of r. 95, if the application cannot be heard before the time specified in the notice for compliance with the requirements of the bankruptcy notice, the registrar shall extend the time for the hearing. Thus, *what happened in this case was that when the hearing of encl. 3 was fixed on 30 August 1989, the judge hearing the bankruptcy petitions on that day*

overlooked this application but proceeded to dispose of encl. 6, which was a notice of motion for an order that further proceedings be stayed until the payment of costs by the respondent to the appellant in respect of an earlier proceeding. From the record, no fresh date of hearing in respect of encl. 3 was given by the court, and nor was there any evidence that the registrar had granted an extension of time for the hearing of the application. Encik Ooi submitted that failure of the registrar to extend the time did not invalidate the appellant's application in encl. 3. Counsel relied on the judgment of VC George J in Re Natarajan a/l Kuppusamy, ex p Co-operative Central Bank Ltd (in receivership) who held that in the face of the language in r. 95(2), the time for the compliance with the bankruptcy notice was to be deemed to have been extended by the registrar until the application had been disposed. The learned judge followed the judgment of the Federal Court in *Soh Bok Yew v. Cindee Developments Sdn Bhd*, where, in its judgment, it referred to a judgment of Harman J in *Re A Debtor* (No. 10 of 1953) at p. 1054 which states: 'The rule is directory and compels the registrar to extend it until the application has been heard and determined'.

One of the points argued in *Soh Bok Yew* was whether the various adjournments made by the judge had complied with the requirements under r. 95(2) that the registrar should extend the time for compliance under the notice. The Federal Court, relying on Harman J's *dictum*, held that 'the fact that the various adjournments on record were made in open court by the learned trial judge does not make any difference because the registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice'. (at p. 243).

The learned judge further stated that based on his own enquiries from the current practice in our courts, the registrars generally did not expressly extend the time which they were required to do by r. 95(2).

For reasons stated by George J, with which we agree, we say that r. 95(2) is merely directory which compels the registrar to extend the time until the application opposing the bankruptcy notice is heard and determined.

(emphasis added)

[26] I am of the opinion that the respondent cannot challenge the validity of the BN in this case. My view is based on the following grounds:

(a) the respondent has not challenged the validity of the allocatur. Nor has the respondent appealed against the legality of the allocatur and applied to stay the execution of the allocatur pending such an appeal;

(b) the substituted service of the BN on the respondent, has not been disputed by the respondent;

(c) upon the substituted service of the BN on the respondent, the respondent has failed to pay the sum demanded in the BN within the time stipulated in the BN. As such, the respondent has committed an act of bankruptcy within the meaning of s. 3(1)(i) BA. The respondent has not challenged this act of bankruptcy;

(d) the respondent has not affirmed Form 7 to set aside the BN. This is understandable as the respondent has not paid the sum demanded in the BN. Nor has the respondent any counter-claim, set-off or cross demand against the appellant which is equal or exceeds the sum; and

(e) the only contention advanced by the respondent is the lack of authority on the part of the appellant's deponent to affirm the verifying affidavit.

Is Respondent's Notice Defective?

[27] If a debtor has not challenged the validity of a BN by affirming Form 7 or if the Bankruptcy Registrar has dismissed the debtor's application to set aside the BN, the debtor is nevertheless entitled to oppose the CP under r. 117 BR by filing a notice "to show cause" against the CP in Form 16 of the Appendix to BR (Form 16). Form 16 provides as follows:

No. 16

(Rule 117)

(Title)

NOTICE BY DEBTOR OF INTENTION TO OPPOSE PETITION

I, the above ... ,do hereby give you notice that I intend to oppose the making of a receiving order as prayed and that I intend to dispute the petitioning creditor's debt (or the act of bankruptcy, or as the case may be).

(emphasis added)

[28] Rule 117 BR merely requires Form 16 to be filed. There is no requirement for the debtor to affirm an affidavit to oppose the CP. This is clear from Nik Hashim J's (as His Lordship then was) judgment in the High Court case of *Re Che Ku Rohaida Che Ku Sin; Ex P Public Finance Bhd* [2002] 5 CLJ 435, at p. 438; [2002] 1 MLJ 209, at p. 213, as follows:

In my view, for the purpose of opposing the creditor's petition under r. 117, there is no need for a debtor to file an affidavit in support of the notice or to comply with r. 18. A notice in form 16 is sufficient.

(emphasis added)

[29] In *Dato' Sri Teong Teck Leng*, at paras. 32 and 37, the Court of Appeal held as follows:

32. *In our view, where the judgment debtor only wishes to show cause against the petition, all he has to do is to file a notice in Form [16] specifying the statements in the petition which he intends to deny or dispute. That is all he has to do*. This has been correctly pointed out by James Foong J in *Re Ngan Chin Wen; Ex p Moscow Norodny Bank Ltd* [1995] MLJU 159; [1996] 2 CLJ 943.

…

37. … But, *where the debtor wants to apply to set aside the petition on other grounds, eg for non-compliance with the rules regarding the petition, then a summons in chambers must be filed. This is understandable because such grounds arise separately from the statements in the petition and therefore cannot be 'specified' in*

the notice (Form No 16). The difference between the two may be likened to a defendant in a civil suit who wants to defend the action and a defendant who wants to strike out the writ and the statement of claim. In the case of the former, he merely files a statement of defence. In the latter case, he has to file a summons in chambers under O. 18 r. 19 of the RHC.

(emphasis added)

[30] In *Datuk Lim Kheng Kim*, at pp. 328-329 (CLJ); pp. 304-305 (MLJ), the Supreme Court decided as follows in respect of non-compliance with rr. 18(1) and 117 BR:

Rule 117 provides that where a debtor intends to show cause against a petition, he shall file a notice specifying the statements in the petition which he intends to deny or dispute. The format of the notice of intention to oppose the petition is given in Form 16 of [BR], which simply provides that: …

Looking at the appellant's 'affidavit in opposition', it appears that he had jumbled up every conceivable grounds of opposition he could think of in this affidavit, which not only includes grounds raised in encl. 3, but also submissions of law and pleas for the court to exercise its discretion judicially and in the interest of justice. Bearing in mind that this 'affidavit in opposition' was filed one month after the creditor's petition was served on him and contained multitude of grounds other than the existence of a counter-claim or set-off or cross demand, he should have made a formal application by motion supported by this affidavit in compliance with r. 18 …

In our opinion, failure on the part of the appellant to follow r. 18 renders his 'affidavit in opposition' ineffective and bad in law because unless the court otherwise directs, challenges to the creditor's petition or bankruptcy notice other than that he has a counterclaim, set-off or cross demand which equals or exceeds the judgment debt, must be made by filing a notice of motion supported by an affidavit. Unfortunately, he has failed to do so in this case.

(emphasis added)

[31] Mohd Dzaiddin FCJ (as His Lordship then was) has decided in the Federal Court case of *Development & Commercial Bank Berhad v. Datuk Ong Kian Seng @ Ong Kin Cheang* [1995] 3 CLJ 307; [1995] 3 AMR 2063 (*Datuk Ong Kian Seng*) that there should be mandatory compliance with r. 117 BR and a breach of r. 117 BR cannot be cured by s. 131 BA and r. 274 BR:

Whereas, in our case here, rule 117 [BR] clearly provides that if a debtor intends to show cause against the petition, he shall file a notice in Form 16. We hasten to add that *no breach of a mandatory rule can be described as a formal defect or an irregularity that can be cured* (*Au-Yong v. Dicum & Anor* [1963] 29 MLJ 349, 354, CA).

We are also of the view that s. 131 [BA] and rule 274 [BR] do not apply.

…

For reasons we have given above, in our judgment, the *respondent's affidavit was of no effect, and in consequence thereof, he could not show cause against the petition and on this ground alone this appeal should be allowed.*

(emphasis added)

[32] In this case, the respondent is only challenging the authority of the appellant's deponent to affirm the verifying affidavit. The respondent is not relying on r. 117 BR and Form 16 "to deny or dispute" the statements in the CP regarding the respondent's debt or the respondent's act of bankruptcy. Accordingly, the respondent's notice is defective for "erroneous" reliance on r. 117 BR and Form 16.

[33] Based on *Datuk Lim Kheng Kim*, *Datuk Ong Kian Seng* and *Dato' Sri Teong Teck Leng*, the respondent should have filed a summons in chambers (SIC) supported by an affidavit in accordance with r. 18(1) BR to set aside the CP on the ground that there has been non-compliance with BA and/or BR when the appellant's deponent has not been duly authorised by the MC to affirm the verifying affidavit on behalf of MC. If the SIC has been filed to set aside the CP, both the SIC and CP should be heard together, so as to save time, effort and costs. In *Dato' Sri Teong Teck Leng*, at para. 40, the Court of Appeal explained as follows:

> 40. We are of the view that there should be no separate hearing of the notice of intention to oppose the creditor's petition. It is to be considered at the hearing of a creditor's petition, just as a statement of defence is not heard separately from the hearing of the claim. It may be different in the case of an application by way of a summons in chambers to strike out the creditor's petition. *Even then, for the sake of expediency, unless, for some reasons, it is not practical, the summons in chambers should be heard together with the creditor's petition.*
>
> (emphasis added)

Appellant Is Estopped From Raising Non-Compliance With r. 18(1) BR

[34] In this case, no SIC has been filed by the respondent under r. 18(1) BR to set aside the CP on the ground that the appellant has breached BA or BR when the appellant's deponent has no authority to affirm the verifying affidavit on the appellant's behalf. Having said that, no objection has ever been raised by the appellant before the learned DR and before this court regarding the respondent's failure to file a SIC. Accordingly, the appellant is estopped from raising such an objection in this appeal. I rely on the Federal Court's judgment delivered by Gopal Sri Ram JCA (as His Lordship then was) in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, at p. 294; [1995] 3 MLJ 331, at p. 344, as follows:

> *The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.*
>
> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.
>
> (emphasis added)

Is There A Mandatory Requirement For Appellant's Deponent To Be Duly Authorised To Affirm Verifying Affidavit?

[35] I am only able to find one appellate decision on the interpretation of s. 133(a) BA. In *Kamaruddin bin Mohamed v. United Motor Works (M) Sdn Bhd* [1980] 1 LNS 207; [1982] 1 MLJ 126, at 128, Abdul Hamid FJ (as His Lordship then was) held as follows in the Federal Court:

> I now turn to the final ground of appeal. *Substantially it is appellant's contention that the Credit Manager did not have the required authority to institute the bankruptcy proceedings on behalf of the respondents in compliance with section 5 [BA].*
>
> I reiterate that Anuar J dismissed the objection when the same was raised before him at the hearing of the application to set aside the bankruptcy petition. *There was clear evidence that Wong Kong Chung, Credit Manager of the respondents was authorised under seal of the corporation on February 3, 1976 and by that authority he was authorised to act or take action for all or any of the purposes of the Act, i.e. in respect of any process or proceeding thereunder. In accordance with such authority he presented the petition in the name of the corporation. It may well be that when he described himself an attorney he was not really giving an accurate description, nevertheless he did have the required authority. The error there was, to my mind, essentially as to form and, would only have amounted to an irregularity insufficient to warrant the proceeding to be invalidated. (See section 131 of the Act) I would also stress that there was no question of any misrepresentation on the face of the petition. On consideration this court is satisfied that section 133(a) of the Act had been fully complied with.*
>
> (emphasis added)

[36] *Kamaruddin*, in my view, has not decided that s. 133(a) BA and r. 215 BR are mandatory provisions. The Federal Court only held in *Kamaruddin* that s. 133(a) BA had been complied with based on the evidence adduced in that case.

[37] My research has shown that the High Court decisions on the construction of s. 133(a) BA and r. 215 BR, do not speak in one voice. The following High Court cases, in chronological order, have interpreted s. 133(a) BA and r. 215 BR:

(a) Wan Hamzah J (as His Lordship then was) held as follows in *Re Chen Sing Chew; Ex Parte: Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 204; [1974] 2 MLJ 69, at p. 70:

> The judgment-debtor in his affidavit raises objection to the proceedings on yet another ground. *It is contended that the bankruptcy proceedings are bad due to lack of authority for Mr. N. Takai to institute the proceedings on behalf of the Oriental Tin Smelters Sdn. Bhd. The petition for bankruptcy was signed by Mr. N. Takai, a director of the judgment-creditors, and dated 27th October, 1972. When the validity of the proceedings was challenged an affidavit affirmed by Mr. N. Takai was filed in which he stated that he had been duly authorised by the judgment-creditors to act on their behalf in all matters in connection with the bankruptcy proceedings against the*

judgment-debtor. A written authority was attached to the affidavit bearing the seal of the company but it was not dated. When Mr. N. Takai was cross-examined, he disclosed that the authority was given to him on 1st March, 1973. It is clear that when he signed the petition on 27th October, 1972 he had no such authority.

(emphasis added)

(b) in *Re Mat Shah bin Safuan, ex p United Asian Bank Bhd* [1990] 1 LNS 115; [1991] 2 MLJ 48, at 49-50, Siti Norma Yaakob J (as Her Ladyship then was) gave the following judgment:

The petition in these proceedings is presented by S Sinnappan, the manager and the attorney of the judgment creditor and who also affirmed the truth of the statements in the petition. In this instance, the debtor questioned the authority of S Sinnappan as from discreet inquiries he had made at the headquarters of the judgment creditor, the debtor has discovered that S Sinnappan only holds a delegated power of attorney and that he did not have the authority to use the seal of the judgment creditor as no resolution to that effect had been passed by the board of directors of the judgment creditor authorising him to use the seal. For this contention the debtor relies on r. 215 [BR], which states as follows: …

From the petition in these proceedings, it is clear that it is presented by the judgment creditor, a corporate body and signed by S Sinnappan, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb of r. 215. The power of attorney dated 23 May 1973 gives wide powers to S Sinnappan to act on behalf of the judgment creditor and under cl. 8(d) it expressly states that he can act singly on behalf of the judgment creditor in all matters arising out of the bankruptcy of any person indebted to the bank. By virtue of his official standing alone, he has every authority to present a petition on behalf of the judgment creditor and there is no question that he needs the authority to use the seal of the judgment creditor or that there must be a board resolution passed authorising him to use the seal. That is only relevant where a corporation chooses an agent, who is not a bank officer, to act on its behalf and under those circumstances, the agent is also referred to as 'an officer' within the meaning of s. 133(a) of the Act.

(emphasis added)

(c) in *Re Yong Tet Yin; ex parte United Overseas Bank Ltd* [1996] 1 BLJ 158 at pp. 159-161; [1995] 4 MLJ 582, at pp. 584-586, Tee Ah Sing JC (as His Lordship then was) decided as follows:

In this bankruptcy proceeding the learned counsel for the judgment debtor raised a preliminary objection as to whether there is in fact a valid creditor's petition before the court on two grounds. … Secondly, Wong Chee Kiong had no authority to sign on behalf of Overseas Union Bank Ltd. He referred to para 4 of Wong Chee Kiong's affidavit affirmed on 12 September 95. …

I shall now deal with the second ground of objection.

The material parts of the creditor's petition reads as follows:

> We, United Overseas Bank Ltd ... By Wong Chee Kiong duly authorised under a Power of Attorney dated 10.4.91 to sign and present this petition, hereby petition the court that a Receiving Order and Adjudication order be made in respect of Yong Tet Yin …

And at page 2 of the petition it reads as follows:

> United Overseas Bank Ltd by its Attorney Wong Chee Kiong to sign and present this petition.

The relevant part of the affidavit of truth of statement in petition is as follows:

> I, Wong Chee Kiong …, the Branch Manager of United Overseas Bank Ltd, the petitioners named in the petition … affirm and say as follows:
>
> > 1. That I am the Branch Manager of United Overseas Bank Ltd and am duly authorised by virtue of a Power of Attorney dated the 10th April 1991 to sign and present the said petition and to make this Affidavit.

The creditor's petition is presented by Wong Chee Kiong, the Attorney of the judgment creditor and who also affirmed the truth of the statements in the petition. In the affidavit of truth of statement in petition Wong Chee Kiong was described as the manager and attorney of the judgment creditor. …

From the petition it is clear that it is presented by the judgment creditor, a corporate body, and signed by Wong Chee Kiong, the manager and attorney of the judgment creditor. Thus the petition is presented under the second limb of r. 215 [BR].

The creditors' petition was filed in compliance with Rule 99 of the Rules and the form No 9.

On the face of the creditors' petition and the affidavit of truth of statement in the petition it would appear that Wong Chee Kiong has authority to sign and present the petition.

I therefore reject the second ground of preliminary objection.

(emphasis added)

(d) Kamalanathan Ratnam JC (as His Lordship then was) held as follows in *Re Samuel Pakianathan a/l Jabamanickam; ex p Perwira Habib Bank (M) Bhd* [1996] 1 LNS 126; [1997] 5 MLJ 737, at pp. 756-757, 758 and 759

The creditor's petition filed herein reads:

> We, Perwira Habib Bank Bhd … by Tan Kwe Hee and Ab Rahim bin Hassan, the Manager and Assistant Manager respectively duly authorised by the company to sign …

and the creditor's petition was signed by the said persons as being duly authorised by the company. Similarly, the affidavit verifying truth of statement in the petition dated 16 March 1990 as required under s. 6(1) of the Act states as follows:

> We, Tan Kwe Hee and Ab Rahim bin Hassan, the Manager and Assistant Manager respectively of Perwira Habib Bank Malaysia Bhd duly authorised to act for and on its behalf for all or any of the purposes of the Bankruptcy Act 1967, the petitioner named in the petition hereunto annexed,

…

The appellant argued that nowhere in the petition or in the affidavit did the signatories say that they were authorised under seal of the company.

…

Clearly, the words 'under seal' as is required under s. 133 [BA] read with r. 215 [BR] is missing from the creditor's petition and the affidavit. Furthermore, there was no evidence presented to this court to show that both these officers had indeed been authorised under seal. …

The principle which I draw from the above case is that so long as a person is authorised under seal of the company to act under s. 148, he therefore becomes an 'officer' under the Act. Likewise, in s. 133 [BA], an 'officer' duly authorised must be one who had been authorised 'under the seal of the corporation'.

…

It is to be noted that in each of the cases above cited, the authority from the corporation was given to the 'officer' under seal and proof of such authority must be furnished when challenged. In the instant case, the deponents to the affidavit were clearly not authorised under seal as admitted by them. Had the respondent produced any form of authorisation given to these officers under seal even if such authorisation was given long ago, I could have considered it but none was produced.

…

It would thus be of no great inconvenience to the companies concerned to have authorised their officers in such manner. This not being done, I therefore uphold the appellant's submission on this point. The interpretation given to r. 215 by the respondents would appear at first glance to be correct but upon consideration, it is wrong as all that the rule states is that petition may be presented by a corporation in its own name or in the name of the officer. In both instances, the officer must be duly authorised under seal and s. 133 would override any ambiguity that may have arisen under r. 215.

(emphasis added)

(e) in *Re Lim Chooi Sang, ex p Soon Fay Sdn Bhd* [1999] 5 CLJ 605 at pp. 607-609; [1998] 7 MLJ 286, at pp. 288, 289 and 290, Steve Shim J (as His Lordship then was) decided as follows:

> Quite obviously, the averments contain a concentrated attack on the authority of En Chong Che Chong in presenting the creditor's petition. It is contended that he had no legal authority to present the

said creditor's petition on behalf of the JC (a corporation) and as such, the receiving order and adjudication order granted by the learned SAR are null and void. …

In my view, the central issue in dispute relates to the construction to be placed on s. 133(a) [BA] and r. 215 [BR] upon the facts of the present case. …

In any event, I am more inclined to accept the construction adopted by the court in Re Samuel Pakianathan. In my view, r. 215 has to be read with s. 133 [BA]. Reading the second limb in r. 215 with s. 133, it would seem clear that any officer presenting a creditor's petition on behalf of a corporation has to be duly authorised under seal. In the case of a corporation presenting a creditor's petition by an officer authorised in that behalf, there is no necessity for a board resolution granting the authorisation to be under seal provided that the seal of the corporation is affixed to the authorisation: see Re Midgley (1913) 108 LT 45.

Having regard to the views I take, I am bound to hold that the JC has not shown that En Chong Che Chong who presented the creditor's petition on behalf of the JC, a corporation, had been duly authorised under seal to do so at the material time. Neither the creditor's petition nor the affidavit of truth of statement deposed by En Chong Che Chong give any indication that there was an authorisation under seal. In the circumstances, and for the reasons stated, I find there is substance in the first ground advanced by the JD.

(emphasis added)

(f) Wahab Patail J (as His Lordship then was) held as follows *In Re Kang Chong Yeow, Ex P Mivan Far East Sdn Bhd* [2001] 8 CLJ 226, at pp. 239-240; [2001] 3 MLJ 98, at pp. 111-112:

The second ground is that r. 215 [BR] provides that the officer must be duly authorised under seal to commence bankruptcy proceedings.

It was submitted that it was not disputed by the parties that the action was commenced by the officer without authorisation under seal. That submission relied upon encl. 48 para. 11 where James Martin Laughlin deposed for the respondent:

> 11 Saya menafikan bahawa prosiding ini memerlukan seal. Saya mengesahkan sekali lagi di sini bahawa prosiding ini dimulakan dan diteruskan mengikut art. 95, perkara-perkara Persatuan Syarikat Mivan Far East Sdn Bhd. Artikel 95 adalah seperti berikut:
>
> A resolution in writing signed by a majority of the directors for the time being or their alternates not being less than two directors shall be valid and effectual as if it had been passed by a meeting of directors duly called and constituted. Any such resolution may consist of several documents in like form each signed by one or more directors.

A The submission also referred to encl. 26 para. 1 producing a resolution dated 1 April 1998 (exh JML-2) appointing James Martin Laughlin to represent the company in legal proceedings, including bankruptcy proceedings, against the judgment debtor. The resolution did not mention authorising James Martin Laughlin under seal as required by the abovementioned rule. It was argued that in doing so, B the judgment creditor conceded that James Martin Laughlin did not have an appointment under seal.

The respondent had subsequently produced in a supporting affidavit (encl. 67) filed on 19 October 1999 a resolution under seal and dated 15 April 1998 and marked as exh. JML-1. It was submitted for the C appellant that since it was filed on 19 October 1999, after the date of the hearing before the registrar it cannot be accepted. He relied on O. 56 r. 1(3A) of the RHC, that new evidence shall not be admitted unless the judge is satisfied that the fresh evidence was not available to the party seeking to use it or that reasonable diligence would not have made it available, in the hearing before the learned D senior assistant registrar on 17 September 1998. …

It is clear from the first part of r. 215 that where a corporation presents a petition or takes any other action under this Act, it may do so firstly by an officer of the corporation acting in his own name, in which case he has to state that he is such officer duly authorised under seal; and secondly a petition may E *also be presented by the corporation and signed by an officer of the corporation on its behalf. The next part of the rule applies to a third method of presenting a petition, that is by an agent, who is not an officer of the corporation in the ordinary course, but is deemed to be an officer for the purpose of presenting a petition; and since such agent is an independent entity outside the corporation, he would need to be duly authorised under seal before he can present a petition* F *for the corporation.*

The proceeding in this case, however, is clearly taken under the second alternative, that is, by the company Mivan Far East Sdn Bhd. The affidavits deposed by James Martin Laughlin states clearly that he is the executive director of the judgment creditor (respondent) and that he has been authorised to make G *the affidavit on behalf of the respondent. Nothing in this proceeding shows that it is being undertaken by James Martin Laughlin himself on behalf of Mivan Far East Sdn Bhd. In the circumstances, the objection under r. 215 is unsustainable on the facts. Since no authorisation under seal is necessary in this case, it is unnecessary to refer to exh. JML-1 in encl. 67 and therefore the objection under O. 54 r. 1(3A) of the RHC does not arise.*

H (emphasis added)

(g) *Re Ho Fok, ex p Ann Bee (M) Sdn Bhd* [2002] 2 CLJ 223, at pp. 225-230; [2002] 5 MLJ 331, at pp. 334-339, Kang Hwee Ghee J (as His Lordship then was) gave the following judgment:

I The JD [judgment debtor] opposed the petition on the ground that the said Mr Lee had failed to state in his petition and also in the affidavit verifying the petition, that he was authorised under the seal of the JC to present the petition. Both the petition and the affidavit

it was contended, had offended r. 215 [BR] read with s. 133 [BA], and had thereby rendered the petition void and ineffective. Consequently, it was argued, the petition should have been dismissed. …

Counsel for the JD relied on the judgment of Steve Shim J (as he then was) in *Re Lim Chooi Sang; ex p Soon Fay Sdn Bhd* [1999] 5 MLJ 605 at p. 609 in which he had ruled as follows: …

The decision appears to be at variance with the judgment of Abdul Wahab Patail J in *Re Kang Chong Yeow* [2001] 3 MLJ 98 wherein he had commendably analysed r. 215 [BR]. He found that there were three ways by which a corporation may go about to present a bankruptcy petition under that rule. The JC's company in that case, it was held, was perfectly entitled to present the petition by its executive director notwithstanding that he may not have been authorised under seal. …

I am, with respect, inclined to agree with the decision of Abdul Wahab Patail J in *Re Kang Chong Yeow*.

As in *Re Kang Chow Yeow*, the petition in the instant case was signed by a director of the JC, Mr Lee Neh @ Lee Pins Ten. It therefore falls squarely within that limb of r. 215 that allows a petition to be 'presented by the corporation, and signed by the officer on its behalf'. It does not therefore require the person to state that he had been authorised under seal.

The view that a corporation may act by itself through its officers under the second limb of r. 215 without having to be authorised under seal is shared by two other High Court decisions.

Hence in *Re Yong Tet Yin; ex p United Overseas Bank Ltd* [1995] 4 MLJ 582, a bankruptcy petition presented by a person acting purely as 'the manager and attorney' of the JC, United Overseas Bank Ltd, was held to be perfectly valid. The court considered both the provisions of r. 215 [BR] and s. 133 [BA] but did not consider it necessary to attach any significance to the words 'authorised on that behalf under the seal of the corporation' in s. 133 [BA]. …

The decision in *Re Yong Tet Yin* seems to ride in tandem with another rational High Court decision, ie, that of Siti Norma Yaakob J (as she then was) in *Re Mat Shah bin Safuan; ex p United Asian Bank Bhd* [1991] 2 MLJ 48 where both r. 215 [BR] and s. 133(a) [BA] were considered. …

More however, needs to be said of the function and power of the director of the company to provide the rationale for that aspect of the rule.

As the learned authors of *Chan & Koh's Company Law* wrote at 6.101 of their work:

> A company being a fictitious persona 'cannot act in its own person, for it has no person'. Any proposition about a company necessarily involves a reference to a set of rules

A by which acts are attributed to the company. This set of rules has been described as the 'rules of attribution' which are said to contain the 'primary rules of attribution' and 'general rules of attribution'. A company being a *persona ficta* may only act through the agency of natural persons.

B Being an artificial person therefore, a company can only act by delegating its power to its directors. Generally, the scope of that delegated power is defined under its articles of association which would invariably have to include the power provided in Table A of 4th Sch to 'exercise all such powers of the company as are not, by the Act or by these regulations, required to be exercised by the C company in general meeting'.

It follows therefore, that if a petition is signed by a director of a company as in the instant case, it must be accepted as a matter of course that it is presented by the company under such a delegated power. There is hardly any ground to question the legality of its presentation. The petition has been as D immaculately conceived as it could possibly have been.

In my considered view, there is hardly any justification to read r. 215 [BR] in conjunction with s. 133(a) [BA] and to find therefrom that in all the three instances of presenting a petition of a corporation under r. 215, the officer must be authorised under the seal of the corporation, and that a failure to state so in the petition renders the petition void and ineffective.

E

Section 133(a) [BA] merely says that for the purpose of the Act, a corporation may act by any of its officers authorised under the seal of the corporation so to act. It does not say that the corporation must, at all costs and in all cases, act only by its officer who must be authorised under the seal of the corporation. The section is therefore purely directory and not mandatory in nature.

F

It would be ideal if a corporation decides to act in harmony with the requirement. But the fact that the authority to act was not given to him under the seal of the corporation does not *ipso facto* mean that the officer does not have the authority to act for the corporation and that the petition should be dismissed forthwith.

G *The purpose of Rule 215 [BR] and s. 133(a) [BA] is merely to prescribe a format within which a corporation should go about in presenting a bankruptcy petition, thereby providing in the process some form of orderliness and certainty – as where for instance an officer can positively assert in the petition itself that he had been authorised under the seal of the corporation to present the petition*. There could be little in the way of his standing that can be H questioned – for has he not with him the very seal of the corporation?

But that does not necessarily mean that the petition should be rejected by the court merely because the officer did not follow this procedure if he could show by other convincing means that he has indeed been authorised to act for the I *corporation, such as by a resolution of the board of directors, as the petitioner did in the instant case*.

There is a common law presumption that every official act is presumed to have been regularly performed. Where therefore, on the face of it, a petition indicates that it is being presented by an officer of the corporation, a party questioning the legality of its issuance must first show by some credible evidence that he has reason to believe that it has not been issued with the authority of the corporation. It is insufficient merely for him to point to some perceived irregularities in the petition and apply for the petition to be dismissed.

Whereas when a pleading is challenged on valid ground with respect to the authority of the issuer to act for a company, the court has always resolved it by staying the proceeding in order to allow the company to determine positively whether he has been authorised to commence the proceeding and where appropriate, to ratify or rectify any defects that may arise (see *Pender v. Lushington* (1877) 1 Ch D 70; *Avel Consultants Sdn Bhd & Anor v. Mohamed Zain Yusof & Ors* [1985] 2 MLJ 209. The same practice should apply to any petition, including a bankruptcy petition.

The JD in this case is not therefore at liberty to raise what he had perceived as an irregularity on the face of the petition as a ground to dismiss the petition.

The appeal is dismissed with costs.

(emphasis added)

(h) in *Re Che Ku Rohaida* (2002), at pp. 439-441 (CLJ); pp. 214-216 (MLJ), Nik Hashim J (as His Lordship then was) decided as follows:

The petitioner creditor in its petition (encl 6A) commenced the action by stating 'Kami (we), PUBLIC FINANCE BHD' and in the premises, Public Finance Bhd must sign the petition. **The petition contains an illegible signature of someone without designation**. The petition was presented on 25 July 2000.

It was deposed in the affidavit affirmed on 21 July 2000 and verifying the creditor's petition (encl. 6B) that the deponent, Tan Teng Hoong, was duly authorised by the creditor to affirm the said affidavit and to present the creditor's petition on its behalf.

As a result of the opposition by the debtor's notice (encl. 13A) disclosing the defects in the petition, the deponent thereafter admitted in his affidavit affirmed on 7 February 2001 (encl. 14A) that he signed the petition, and that the creditor had *vide* the letter of authorisation dated 30 January 2001 (exh 'TTH 1') duly authorised the deponent under the seal of the creditor to act on its behalf and also ratified any and all actions taken by the deponent earlier in the bankruptcy proceedings against the debtor.

In defending the validity of the petition, learned counsel for the creditor submitted that the authority, although given after the date of the petition, is valid by reason of the creditor ratifying the act of its agent by virtue of s. 149 of the Contracts Act 1950 ('the CA').

With respect, I do not agree with her. In my view, the law of contract of ratification of acts done by an agent on behalf of another under s. 149 of the CA has no application to bankruptcy proceedings in respect of r. 215 [BR] and s. 133(a) [BA]. …

Thus, by their provisions, it implies that the authority must be in existence when the petition is presented, and such authority cannot therefore be ratified retrospectively, though such authority may be granted for the future presentation of a petition in respect of acts of bankruptcy which may not have arisen at the date when the authority was given (see Re Samuel Pakianathan a/l Jabamanikam; ex p Perwira Habib Bank (M) Bhd [1997] 5 MLJ 737).

However, in the case under discussion, there was only an illegible signature of someone without a designation. Learned counsel for the debtor rightly pointed out that there is nothing in the petition to show that the petition has been signed by the petitioner creditor or the authority of some other person duly authorised to sign the petition on behalf of the petitioner creditor as required by r. 215 and s. 133(a) [BA] on 25 July 2000 when the petition was presented. Further, the attestation by the solicitor in the petition fails to state who signed the petition and in what capacity was it signed.

The material aspect of the instant case is somewhat identical to the facts in *Re Chen Sing Chew*. There, the judgment debtor raised objections to the creditor's petition, *inter alia*, on the grounds that there was lack of authority on the person who signed the petition. The bankruptcy petition was dated 27 October 1972, whereas the authority to the officer, one N Takai, was given after the date of the petition, ie on 23 October 1973. Wan Hamzah J (as he then was) upheld the debtor's objection and dismissed the petition, *inter alia*, on the grounds of lack of authority to commence the bankruptcy proceedings against the debtor.

With great respect, I am in full agreement with the learned judge's ruling. *Similarly, in the present case, the petition is defective for lack of authority on the person who signed the petition to commence the bankruptcy proceedings against the debtor. The petition fails to comply strictly with the provisions of r. 215 and s. 133(a) [BA] as the petition was signed by some person without any particulars of his name or authority. The failure to comply with the provisions is fatal to the petition. The authority must exist in order to present the petition. Thus, the existence of the authority is a prerequisite for the presentation of a petition. Accordingly, the creditor's letter of authorisation dated 30 January 2001 cannot therefore ratify the unauthorised petition. The petition was a nullity as at the date of its presentation on 25 July 2000*.

In determining the two issues, the court accorded the provisions in the [BR] and [BA] a strict construction in a manner most favourable to the debtor. Edgar Joseph Jr J, (as he then was) in *Sobri bin Arshad v. Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 at p. 34 aptly said:

> On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often

> necessary. The case of *In re North, ex p Hasluck* [1895] 2 QB 264 is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Thus, by reasons of the aforesaid matters, I hereby dismiss the appeal with costs, and the petition at encl. 6A is dismissed.

(emphasis added); and

(i) in *Re Tan Sri Amin Shah Omar Shah; Ex p Affin Bank Bhd* [2008] 9 CLJ 772, at pp. 776-777; [2008] 8 MLJ 125, at pp. 129-131, Mohd Hishamudin J (as His Lordship then was) decided as follows:

> [6] … Learned counsel for the debtor in his written submission submits that the officer, Mohamad Aslam, who signed the petition did not have the authority to sign and to present the same on behalf of the creditor. The reason put forward by counsel for the debtor for the absence of authority on the part of the officer is that Encik Aslam had not adhered strictly to the power of attorney issued to him by the creditor and that in any event the power of attorney had been 'tampered' with. Counsel's argument on the point pertaining to the power of attorney is detail and lengthy. However, I do not in this judgment propose to go into the details of counsel's argument as I am of the view, that in the light of the fact that the petition itself does not state that the signing and presentation of the petition by the officer was pursuant to any power of authority, such an argument is irrelevant.
>
> [7] The procedure for the presentation of a petition on behalf of a corporation is provided for under r. 215 [BR]. It states, *inter alia*, that a petition may be presented by the corporation and signed by the officer on its behalf. …
>
> [8] *Now, upon examining the manner the petition is presented, the presentation of the petition in the present case is clearly pursuant to the second (alternative) limb as provided for by the above r. 215, that is to say, pursuant to that part of the provision that stipulates*:
>
> > … a petition may be presented by the corporation, and signed by the officer on its behalf …
>
> [9] *This means that the petition is presented by the corporation (that is the company, Affin Bank Bhd) and is signed by a duly authorised officer of the company. That officer, as I have mentioned earlier, is Mohamad Aslam Khan bin Ghulam Hassan, a senior vice president, Special Asset Management, of the bank/corporation (the creditor). It is significant to note that the petition states that he is an officer of the creditor company and that he has been authorised to sign and to present the petition on behalf of the creditor company. And the petition bears his signature.*
>
> [10] *When the presentation is pursuant to the second (alternative) limb of r. 215, the officer signing does not need to be armed with a power of attorney. All that he is required to have is the authority to sign and to present the petition; and in the petition and verifying affidavit he must state that he is an officer*

of the company/creditor and that as an officer he is duly authorised by the company to sign and to present the petition on behalf of the company. Since in the present case the signing and presentation of the petition was by an authorised officer of the creditor pursuant to r. 215, therefore, the argument of the debtor's counsel pertaining to the power of attorney issued to the officer Mohamad Aslam, even if a power of attorney had been issued to him, is totally irrelevant.

[11] *Since Encik Aslam's authority is being challenged by the debtor, I must add here that there is affidavit evidence to show that Encik Aslam derived his authority from the creditor company board of directors' resolution dated 27 February 2006. By this resolution, Encik Aslam was empowered to represent the creditor in any court proceedings to sign, execute or affirm all documents, letters, notices, affidavits, petitions, in respect of, or in relation to, or in connection with or rising from such court proceedings, for and on behalf of the creditor. This resolution was passed before the presentation of the creditor's petition*.

[12] *Therefore, I found that there is no merit in the contention that the officer Mohamad Aslam Khan bin Ghulam Hassan was not authorised to sign the creditor's petition and the affidavit verifying the petition. It is clear from the creditor's petition that it was signed and presented on behalf of the creditor by Encik Aslam who was duly authorised to bring the proceedings herein against the debtor*.

(emphasis added)

[38] Sections 4 and 5(1)(a) to (d) BA prescribe the conditions for a creditor to present a "bankruptcy petition" (defined in s. 2 BA to include a "petition for a receiving order", such as the CP in this case). Sections 4 and 5(1)(a) to (d) BA do not stipulate as a condition for the presentation of a CP that the deponent of the verifying affidavit should be duly authorised by the creditor to affirm the verifying affidavit.

[39] I am of the view that s. 6(1) BA and r. 106(2) BR only require the contents of the verifying affidavit to be verified by a person who has personal knowledge of the facts upon which the CP is based and there is no mandatory requirement that the deponent of the verifying affidavit should be duly authorised by the creditor. My view is based on the following reasons:

(a) the clear words of s. 6(1) BA and r. 106(2) BR support the above view:

(i) s. 6(1) BA – "A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts"; and

(ii) r. 106(2) BR – "A petitioning creditor who cannot himself verify all the statements contained in his petition shall file an affidavit made by some person who can depose to them";

(b) Form 11 of the Appendix to BR (Form 11) provides for the verifying affidavit. Form 11 reads as follows:

No. 11

(Rule 106)

(Title)

AFFIDAVIT OF TRUTH OF STATEMENTS IN PETITION

I, the petitioner named in the petition hereunto annexed, affirm (if the petitioner declare or affirm, alter the form accordingly) and say:

1. **That the several statements in the said petition are within my own knowledge true**.

Affirmed at, etc ...

NOTE - If the petitioner cannot depose that the truth of all the several statements in the petition is within his own knowledge, he must set forth the statements the truth of which he can depose to, and file a further affidavit by some person or persons who can depose to the truth of the remaining statements.

(emphasis added)

It is clear that Form 11 does not require the deponent of the verifying affidavit to be duly authorised by the creditor. Rule 4 BR provides that the forms in the Appendix to BR, where applicable, shall be used;

(c) the above view is supported by a comparison between Form 11 with r. 26 of the Companies (Winding-up) Rules 1972 (WUR) and Form 7 of the First Schedule to WUR (Form 7 WUR). Rule 26 WUR and Form 7 WUR provide as follows:

r 26 *Every petition for the winding-up of a company by the Court shall be verified by an affidavit referring thereto. The affidavit in Form 7 shall be made by the petitioner or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some director, secretary or other principal officer thereof, and shall be sworn after and filed within four days after the petition is presented, and the affidavit shall be prima facie evidence of the statements in the petition.*

Form 7 WUR

No. 7

(Rule 26)

AFFIDAVIT VERIFYING PETITION IF THE PETITION IS BY A LIMITED COMPANY

(Title)

I, A. B. , of etc. , make oath (solemnly, sincerely and truly affirm) and say, that such of the statements in the petition now produced and shown to me, and marked with the letter "A" as relate to my own acts and deeds are true, and such of the said statements as relate to the acts and deeds of any other person or persons I believe to be true.

Sworn or affirmed, etc.

IF THE PETITION IS BY AN INDIVIDUAL OR FIRM

(Title)

I, A. B. , of etc. , make oath (solemnly, sincerely and truly affirm) and say, as follows:

(1) I *am (a Director or the Secretary) of ... Company Limited the petitioner in the above matter, a company duly incorporated under the Companies Act, and am duly authorised by the said petitioner to make this affidavit on its behalf.*

(2) Such of the statements in the petition now produced and shown to me marked with the letter "A" as relate to the acts and deeds of the said petitioner are true and such of the statements as relate to the acts and deeds of any other person or persons I believe to be true.

Sworn or affirmed, etc.

(emphasis added).

Form 7 WUR, unlike Form 11, has expressly required the deponent of an affidavit verifying the contents of a winding up petition, to be duly authorised by the petitioner to affirm the verifying affidavit on behalf of the petitioner;

(d) s. 133(a) BA is not a mandatory provision as is clear from the use of the permissive word "may" in that provision. In *Re Ho Fok*, the High Court has decided that s. 133(a) is "purely directory". Similarly, r. 215 BR employs the directory term "may" in all the following two alternative limbs of r. 215 BR:

(i) "Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal"; and

(ii) "A petition may be presented by the corporation, and signed by the officer on its behalf".

In the High Court case of *Sing Hoe Motor Company Ltd v. Public Prosecutor* [1968] 1 LNS 142; [1968] 2 MLJ 54, at 55, Raja Azlan Shah J (as His Royal Highness then was) held that the word "may" in the then s. 92(4) of the Road Traffic Ordinance 1958 did not provide for mandatory forfeiture of the vehicle but instead provided the court with a discretion to forfeit or otherwise the vehicle.

I am aware that bankruptcy law should be strictly construed as such a law has severe penal or *quasi-criminal* consequences for a debtor. This is clear from, among others, the following Court of Appeal's judgments:

(1) *Stephen Wong Leong Kiong v. HSBC Bank Malaysia Bhd* [2009] 6 CLJ 466; [2011] 4 MLJ 207, at 210; and

(2) *Lim Boon Kiak v. Affin Bank Bhd* [2013] 6 CLJ 579, at 585.

Even if ss. 6(1) and 133(a) BA as well as rr. 106(2) and 215 BR are construed strictly, there is no mandatory requirement for the appellant's deponent to be duly authorised by the appellant to affirm the verifying affidavit. Hence, there can be no breach of BA and BR on this point; and

(e) even if I assume s. 133(a) BA to have mandatory effect and hence, there is a conflict between s. 6(1) BA and s. 133(a) BA, I prefer to apply s. 6(1) BA and not s. 133(a) BA as regards verifying affidavits. This is because s. 6(1) BA is a specific statutory provision concerning verifying affidavits whereas s. 133(a) BA is only a general provision applicable to "all or any of the purposes" of BA. Accordingly, for verifying affidavits, the specific provision of s. 6(1) BA should prevail over the general provision of s. 133(a) BA as provided by the rule of statutory interpretation of *generalibus specialia derogant*. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520; [1995] 1 MLJ 719, at pp. 758-759, Gopal Sri Ram JCA (as His Lordship then was) in the Court of Appeal applied the maxim *generalibus specialia derogant* to give effect to a specific provision of the National Land Code (NLC) in preference to a general provision in NLC.

Based on the same maxim *generalibus specialia derogant*, the specific r. 106(2) BR should be preferred over the general r. 215 BR in respect of verifying affidavits.

Does 2012 Council Still Hold Office?

[40] Assuming I have erred in interpreting ss. 6(1) and 133(a) BA as well as rr. 106(2) and 215 BR, I will discuss whether the 2012 Council still holds office and can lawfully pass the appellant's resolutions dated 29 August 2013 and 19 October 2013.

[41] It is clear from para. 2(1) of the Second Schedule that the 2012 Council "shall cease to hold office at the next" AGM of MC. Section 39(5) STA has provided that the provisions of the second schedule "shall have effect in relation to" MC and council. The word "shall" in s. 39(5) STA and para. 2(1) of the Second Schedule should be given mandatory effect. In *Public Prosecutor v. Yap Min Woie* [1995] 4 CLJ 692; [1996] 1 MLJ 169, at pp. 172-173, the Federal Court in a judgment given by Mohd Dzaiddin FCJ (as His Lordship then was), gave effect to the mandatory term "shall" in the then s. 28 of the Juvenile Courts Act 1947.

[42] Based on para. 2(1) of the Second Schedule read with s. 39(5) STA, I have no hesitation to hold that the 2012 Council still holds office. Such a construction is not affected in any manner by the first proviso to para. 8(2) of the Second Schedule (first proviso) which requires the MC to hold an AGM not more than 15 months from the previous AGM.

[43] The above interpretation is supported by s. 39(4) STA which provides that subject to any restriction imposed or direction given by the MC at a general meeting:

(a) the council "shall" perform the MC's duties;

(b) the council "shall" conduct the MC's business on behalf of the MC; and

(c) for the purpose of performing MC's duties and conducting MC's business, the council "may" exercise any of the MC's powers

(three functions).

[44] The above construction is not affected in any manner by the criminal case. If this court holds that the 2012 Council ceases to hold office, whether by reason of the first proviso or the criminal case, this will result in an absurdity where there is no lawful council to perform the three functions. Such an interpretation will cause undue hardship to all the parcel proprietors of "Ixora Apartments" and all third parties who deal with the MC and the council. In *Wah Tat Bank Ltd & Ors v. Chan Cheng Kum* [1975] 1 LNS 191; [1975] 1 MLJ 97, at p. 100, an appeal from Singapore to the Privy Council, Lord Salmon held as follows:

> *It is however also a canon of construction that a statute should not be construed in such a way as to lead to injustice or absurdity unless its language makes no other course possible.*
>
> (emphasis added)

Based on the golden rule of statutory interpretation as explained in *Wah Tat Bank Ltd*, to avoid injustice or absurdity and to enable the council to perform the three functions, the 2012 Council still holds office despite:

(a) MC's breach of the first proviso; and

(b) the pending criminal case.

Were Members Of 2012 Council Lawfully Replaced?

[45] Encik Radzi has affirmed an affidavit on 4 December 2014 (court encl. No. 33) (Encik Radzi's affidavit) to confirm that:

(a) Encik Radzi and Mr KP Lim have resigned as members of the 2012 Council; and

(b) Ms Tan and Mr Shong have replaced Encik Radzi and Mr KP Lim as members of the 2012 Council.

[46] Encik Radzi's affidavit exhibited minutes of the 2012 Council meeting held on 25 August 2013 (council meeting on 25 August 2013) which showed that the 2012 Council had agreed for Ms Tan and Mr Shong to replace "immediately" Encik Radzi and Mr KP Lim as members of the 2012 Council (Minutes of 2012 Council Meeting on 25 August 2013). Paragraph 2(5) of the Second Schedule allows the "remaining" members of the 2012

Council to appoint other parcel proprietors of "Ixora Apartments" to replace Encik Radzi and Mr KP Lim. In the circumstances, Ms Tan and Mr Shong have been lawfully appointed as members of the 2012 Council at the council meeting on 25 August 2013.

[47] The Minutes of 2012 Council Meeting on 25 August 2013 showed the following persons to be present at the council meeting on 25 August 2013:

(a) the appellant's deponent;

(b) Mr PS Lim;

(c) Mr KP Lim;

(d) Mr Shong; and

(e) Ms Tan.

As Ms Tan and Mr Shong had replaced Encik Radzi and Mr KP Lim as members of the 2012 Council with immediate effect at the council meeting on 25 August 2013, Mr KP Lim was no longer a member of the 2012 Council at the council meeting on 25 August 2013. Even excluding Mr KP Lim, the quorum of four members as required by para. 4(1)(c) of the Second Schedule, had been fulfilled in respect of the council meeting on 25 August 2013.

[48] In view of Encik Radzi's affidavit, especially the Minutes of 2012 Council Meeting on 25 August 2013, the learned DR had erred in fact by deciding that there was no evidence that Encik Radzi and Mr KP Lim had resigned as members of the 2012 Council. As the 2012 Council had indeed met at the council meeting on 25 August 2013 to discuss and approve the appointment of Ms Tan and Mr Shong to replace Encik Radzi and Mr KP Lim as members of the 2012 Council, there was no need for the appellant to rely on the appellant's resolution dated 29 August 2013. In any event, as discussed in the above Parts F1 and F2, the learned DR had no jurisdiction under the BA and BR to question the validity of the appellant's resolution dated 29 August 2013.

Appellant's Resolution Dated 19 October 2013 Is Valid And Cannot Be Questioned By Bankruptcy Court

[49] Paragraph 4(1) of the Second Schedule provides a quorum for meetings of the council. Paragraph 4(1) of the Second Schedule does not provide that there should be a minimum number of members of the council to approve a "circular resolution". As explained above, "circular resolutions" are circulated to members of council for their approval without the need to convene a meeting of the council.

[50] In this case, the appellant's resolution dated 19 October 2013 (which authorised the commencement of bankruptcy proceedings against the respondent) has been approved by three members of the council, namely the appellant's deponent, Ms Tan and Mr Shong. As explained above, Ms Tan

and Mr Shong have lawfully replaced Encik Radzi and Mr KP Lim as members of the 2012 Council by reason of the council meeting on 25 August 2013. There was a letter dated 3 December 2014 issued by the commissioner of buildings (COB) (appointed under s. 3(1) of the Building and Common Property (Maintenance and Management) Act 2007) to confirm that the appellant's deponent is still a member of the 2012 Council. Accordingly, since all the three members of the 2012 Council who have signed the appellant's resolution dated 19 October 2013, are lawful members of the 2012 Council, the validity of the appellant's resolution dated 29 August 2013 cannot be doubted. In any event, as explained in the above Parts F1 and F2, the bankruptcy court has no jurisdiction under bankruptcy legislation to question the validity of the appellant's resolution dated 19 October 2013.

Appellant's Deponent Is Authorised To Affirm Verifying Affidavit Based On His Membership In 2012 Council

[51] Even if this court's above construction of ss. 6(1) and 133(a) BA as well as rr. 106(2) and 215 BR is erroneous, in *Re Mat Shah bin Safuan*, *Re Kang Chong Yeow* and *Re Ho Fok*, the High Court has held that the position of the deponent in the creditor's organisational set-up, may confer authority for the deponent to act for the creditor.

[52] Based on *Re Mat Shah bin Safuan*, *Re Kang Chong Yeow* and *Re Ho Fok*, I am of the view that since the appellant's deponent is recognised as a member of the 2012 Council by the COB, the appellant's deponent is thus authorised to affirm the verifying affidavit by virtue of his membership in the 2012 Council. Accordingly, the appellant's deponent falls within the second limb of r. 215 BR (a petition may be presented by the corporation, and signed by the officer on its behalf).

Adjudication And Receiving Orders Should Be Made Against Respondent

[53] It is clear in this case that:

(a) the allocatur is valid;

(b) the respondent has failed to pay the sum within the time stipulated in the BN;

(c) the respondent has committed an act of bankruptcy within the meaning of s. 3(1)(i) BA;

(d) the appellant's deponent has knowledge of the facts of the CP as required by s. 6(1) BA and r. 106(2) BR;

(e) the appellant's deponent as a member of the 2012 Council, is authorised to affirm the CP on behalf of the MC; and

(f) this court is satisfied that there is no "sufficient cause" under s. 6(3) BA to dismiss the CP

- the respondent should be adjudged a bankrupt under s. 24(1) BA and a receiving order should be made against the respondent pursuant to s. 4 BA.

[54] The above decision is premised on the Federal Court's judgment in *Moscow Narodny Bank Ltd v. Ngan Ching Wen* [2004] 2 CLJ 241; [2005] 3 MLJ 693 (*Ngan Ching Wen*). In *Ngan Ching Wen*, at pp. 701, 711 and 717:

(a) the learned Senior Assistant Registrar of the HC (SAR) dismissed the appellant bank's CP;

(b) the appellant bank appealed against the SAR's decision to the HC Judge but such an appeal was dismissed on the ground that the CP had wrongly lumped together the principal loan sum with interest;

(c) the appellant bank's further appeal to the Court of Appeal was also dismissed;

(d) the appellant bank obtained leave of the Federal Court to appeal against the Court of Appeal's decision in respect of two questions of law; and

(e) at the Federal Court, Abdul Malek Ahmad and Abdul Hamid Mohamad FCJJ (as their Lordships then were) answered both questions of law in favour of the appellant bank. Consequently, adjudication and receiving orders were made against the respondent at the Federal Court.

Court's Decision

[55] Premised on the above reasons, the following order is made:

(a) this appeal is allowed and the DR's decision is wholly set aside;

(b) costs of RM3,000 shall be paid by the respondent to the appellant for this appeal as well as for the proceedings before the learned DR;

(c) the respondent is adjudged a bankrupt with effect from 24 March 2015; and

(d) a receiving order is granted against the respondent with effect from 24 March 2015.